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If You BUILD It, Will They Come? A Look at the 2018 Congressional Reauthorization of the Federal Brownfields Program and Other Amendments to CERCLA

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Introduction

It is possible that no federal environmental law has been criticized as much the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] Yet perhaps even more than the National Environmental Policy Act,[2] CERCLA has been the cornerstone of much of environmental law practice in this country. It not only governs how liability is allocated at actual Superfund sites but also regulates how private parties resolve their disputes about adjacent property sources of contamination, as well as how liability is allocated between present and past owners and operators of facilities. Some critics have opined that the law "has been an utter failure,"[3] while others have somewhat more kindly noted that "CERCLA has been an exercise in trial and error."[4] Despite its faults, CERCLA is still regarded by some environmental practitioners as an important and progressive piece of legislation. As we approach CERCLA's fortieth anniversary, it is notable that the law has been significantly revised just three times since the 1986 amendments reauthorizing the Superfund.

This article will explore the BUILD Act of 2018—the most recent amendments to CERCLA—which was passed as part of the 2018 federal appropriations bill,[5] and will touch upon the missed opportunity to truly enhance CERCLA.

[1] 42 U.S.C. §§ 9601–9675.
[2] 42 U.S.C. §§ 4321–4347.
[3] Frona M. Powell, *Amending CERCLA to Encourage the Redevelopment of Brownfields: Issues, Concerns, and Recommendations*, 53 WASH. U. J. URB. & CONTEMP. L. 113, 121 (1998).
[4] Garry A. Gabison, *The Problems With The Private Enforcement of CERCLA: An Empirical Analysis*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 189 (2016).
[5] Pub. L. No. 115-141, 132 Stat. 1147.

Prior Significant Amendments to CERCLA[6]

In the aftermath of CERCLA's enactment in 1980, litigation was plentiful, beginning—though not ending—with challenges to the constitutionality of CERCLA's imposition of retroactive liability.[7] The statute was controversial from its inception on various fronts.[8] District courts across the country had to grapple with this new piece of legislation that has been described by federal courts as "hastily-drawn,"[9] "marred by vague terminology,"[10] and "fragmented."[11] The Supreme Court has remarked that the law is "not a model of legislative draftsmanship."[12]

More than six years passed before Congress took its first shot at addressing some of the flagrant problems with CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA).[13] With SARA, Congress addressed several glaring fairness issues, including by creating the "innocent landowner" defense[14] to liability for owners who unknowingly purchase contaminated land, so long as they conducted all appropriate inquiries (AAI) into the past history of the property consistent with customary commercial practice and are able to establish other aspects of the defense such as exercising due care.[15] SARA also formalized the right of contribution among potentially responsible parties (PRPs)[16] and added the statutory authority for private suits under CERCLA.[17] In addition to addressing the foregoing liability issues, SARA also reauthorized the Superfund tax and created the National Priorities List—a collection of contaminated sites the EPA should consider the most important, based on certain criteria.

More than 10 years passed before Congress acted on CERCLA again, by passing the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996.[18] With these amendments, Congress created "safe harbor" provisions that exempted lenders and trustees—which had been left exposed after *United States v. Fleet Factors Corp.*[19]—from CERCLA liability by clarifying the definitions of "owner and operator" and "participation in management." Just three years later, Congress amended CERCLA again by passing the Superfund Recycling Equity Act of 1999 (SREA).[20] With SREA, Congress focused its efforts on shielding the solid waste industry by creating a defense to CERCLA liability for persons who send otherwise hazardous materials to a site for recycling purposes.[21]

Then, three years after SREA, Congress passed arguably the most significant improvements to CERCLA since SARA, namely, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the Brownfields Act).[22] The Brownfields Act gave us liability protection for "bona fide prospective purchasers" (BFPPs),[23] which was rather more sweeping than the existing innocent landowner defense. The Brownfields Act also created an exemption from CERCLA liability for persons who contribute *de micromis* amounts of waste to sites.[24]

In addition to addressing a number of liability issues, the Brownfields Act amendments created the federal Brownfields

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[6] There have been other amendments to CERCLA not referenced here, including Title VI and Title XI of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, which extended the authorization of appropriations for the U.S. Environmental Protection Agency's (EPA's) Superfund program through fiscal year 1994, and extended the authority to collect the special Superfund taxes on industry through December 31, 1995, respectively. There were also other minor amendments to the law in 1990 and 1996 concerning the transfer of surplus federal property. These amendments are not discussed in this article.

[7] A search in LexisNexis yielded more than 300 reported cases that referenced the statute from the date of enactment until the first amendments in 1986. An almost book-length exhaustive compendium of reported and unreported cases published by BNA in 1990 and entitled "Ten Years of CERCLA Litigation" was an early reference work for litigators. It was jokingly referred to by some as "100 Years of CERCLA Litigation," a reference to Gabriel García Márquez's magical realism novel, *One Hundred Years of Solitude*.

[8] MICHAEL B. GERRARD & JOEL M. GROSS, AMENDING CERCLA: THE POST-SARA AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, at xi (2006).

[9] *See, e.g.*, United States v. Davis, 882 F. Supp. 1217, 1220 n.1 (D.R.I. 1995); O'Neil v. Picillo, 682 F. Supp. 706, 719 n.2 (D.R.I. 1988); United States v. Ne. Pharm. & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mich. 1984).

[10] *See In re* Sundance Corp., 149 B.R. 641, 660 (Bankr. E.D. Wash. 1993).

[11] *See* Ninth Ave. Remedial Grp. v. Chalmers, 946 F. Supp. 651, 660 (N.D. Ind. 1996).

[12] *See* United States v. Bestfoods, 524 U.S. 51, 56 (1998).

[13] Pub. L. No. 99-499, 100 Stat. 1613.

[14] "The 'innocent landowner defense,' while not titled as such, is a term of art that has been coined by commentators and practitioners. The innocent landowner defense is actually a type of third party defense under CERCLA section 107(b)(3) read in combination with the SARA-added CERCLA section 101(35)." Paul C. Quinn, *The EPA Guidance on Landowner Liability and the Innocent Landowner Defense: The All Appropriate Inquiry Standard: Fact or Fiction?*, 2 VILL. ENVTL. L.J. 143, 144 n.11 (1991); *see also* CERCLA §§ 101(35) and 107(b)(3), 42 U.S.C. §§ 9601(35) and 9607(b)(3).

[15] CERCLA §§ 101(35)(A)–(B), 107(b)(3), 42 U.S.C. §§ 9601(35)(A)–(B), 9607(b)(3).

[16] CERCLA § 113(f), 42 U.S.C. § 9613(f).

[17] David W. Marczely, Note, *Superfund Liability Alternatives for the Innocent Purchaser*, 39 CLEV. ST. L. REV. 79, 88 (1991).

[18] Pub. L. No. 104-208, 110 Stat. 3009, 3009–462 (Sept. 30, 1996).

[19] 901 F.2d 1550 (11th Cir. 1990).

[20] Pub. L. No. 106-113, 113 Stat. 1501, 1501A-598 (Nov. 29, 1999).

[21] *See* GERRARD & GROSS, *supra* note 8, at 20.

[22] Pub. L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002).

[23] *See* GERRARD & GROSS, *supra* note 8, at 46; *see also* CERCLA § 101(40), 42 U.S.C. § 9601(40).

[24] *See* GERRARD & GROSS, *supra* note 8, at 41; *see also* CERCLA § 107(o), 42 U.S.C. § 9607(o).

Program found in CERCLA Section 104(k), providing for redevelopment and assessment grants and loans to qualifying applicants. (These provisions were among the most important to undergo significant revision in the 2018 BUILD Act.)

Since 2002, we have seen CERCLA continue to be a thorn in the sides of the regulated community, state and local governments, EPA, and the environmental practitioners who represent them. In the absence of congressional action, CERCLA has instead evolved through federal court litigation and EPA policy over the past 17 years.

Then, in 2018, Congress passed the BUILD Act. As with other minor amendments to CERCLA since 2002,[25] the BUILD Act takes the "low-hanging fruit."

Legislative History of the BUILD Act of 2018

In the 115th Congress, the original version of the BUILD Act (S. 822) was a bipartisan bill introduced by Senator James Inhofe (R-OK) in 2017 that was initially cosponsored by Democratic Senators Markey (MA) and Booker (NJ), as well as other Republican senators. Within a few months, the bill garnered additional bipartisan support, including New York's Kirsten Gillibrand and Massachusetts's Elizabeth Warren. In all, one Independent senator, six Democratic senators, and two Republican senators cosponsored the bill, clearly signaling a bipartisan desire to make at least some revisions to CERCLA.

In September 2017, the Senate Committee on Environment and Public Works (CEPW) issued a report (Senate Report 115-148) on the bill, reporting favorably on it and recommending that the bill be passed. In its report, the CEPW noted the importance of CERCLA, and cited the fact that more than 1,300 contaminated sites remain on the Superfund National Priorities List. The report also noted that EPA estimates there are more than 450,000 brownfield sites across the country.[26] The report highlighted that in 2001, the Senate passed the bill that ultimately turned out to be the Brownfields Act, by a vote of 99-0.[27] The report said the BUILD Act would authorize the appropriation of $250 million annually for brownfields grants and loans.[28] The Senate bill was never scheduled for a Senate vote.

In the House, Representative Elizabeth Esty (D-CT) introduced H.R. 1758, the House version of the BUILD Act, referred to as the "Brownfields Reauthorization Act of 2017," on March 28, 2017, the same day that the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment held an oversight hearing on "Building a 21st Century Infrastructure for America: Revitalizing American Communities through the Brownfields Program." The Subcommittee received testimony from a state brownfields agency, two mayors, a city councilman, a county chairman, a real estate investment expert, an EPA representative, and environmental engineering firms, among other interested stakeholders.[29] Like the Senate CEPW, the Committee on Transportation and Infrastructure recommended that the bill pass.

A similar bill (H.R. 3017) was introduced in the U.S. House of Representatives on June 22, 2017 by Representative David McKinley (R-WV), with four cosponsors. After Representative Esty and another member were added as cosponsors, the House ultimately passed that bill by a vote of 409-8 on November 30, 2017. The major difference between the two stand-alone bills (H.R. 1758 and H.R. 3017) was in the amount of funds to be made available for remediation grants under CERCLA Section 104(k)(3)(A)(ii). The earlier bill (H.R. 1758) provided for a higher cap—up to $600,000 for each site to be remediated—as the maximum grant award, and allowed for the EPA to increase that amount to $950,000 by application, while the later bill (H.R. 3017) restricted EPA's authority to increase grants to $750,000. H.R. 3017 also increased the amount of new "multipurpose" grant awards by $50,000 (up to $1 million). Substantively, both bills were virtually identical.

The Senate did not take up the House bill, but on March 23, 2018, Congress passed the Consolidated Appropriations Act of 2018—a thrilling 878-page omnibus bill, which was enacted into law upon signature by the President.[30] Buried deep in this spending directive, beginning on page 705, is Division N, the Brownfields Utilization, Investment, and Local Development Act of 2018, the BUILD Act. With the BUILD Act, Congress sought to clarify Superfund liability for state and local governmental entities, extend liability protections to tenants and certain Alaska Native villages and corporations, and formally reauthorize funding for the federal Brownfields Program, as its prior authorization had expired in 2006.[31]

BUILD Act: Section-by-Section Analysis

Section 1 – *Short Title*: As is the case with most congressional bills, the first section simply provides the short title.

[25] For example, in 2005, CERCLA § 104(k)—the Brownfields Program—was slightly amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1956, 119 Stat. 1144, 1515.

[26] S. REP. NO. 115-148, at 1 (2017).

[27] S. REP. NO. 115-148 at 2.

[28] S. REP. NO. 115-148 at 2.

[29] *See* H.R. REP. NO. 115-419, pt. 1, at 7 (2017).

[30] Pub. L. No. 115-141, 132 Stat. 1147.

[31] It should be noted that although the Brownfields Program's authorization expired in 2006, Congress continued to provide funding. In fiscal year 2016 and 2017, for example, the Program received $162.1 million and $153 million, respectively. *See* H.R. REP. NO. 115-419 at 6. The President's fiscal year 2018 request for the Brownfields Program was just $118.4 million, *see id.*; as noted above and discussed below, the Senate bill proposed to more than double that allotment with the appropriation of $250 million annually for the Program, and the BUILD Act ultimately provided for an annual appropriation of $200 million through fiscal year 2023. *See* discussion accompanying *supra* note 28 and *infra* note 62.

Section 2 – *Redevelopment Certainty for Governmental Entities*: This section provides additional CERCLA liability protection to local and state governments. With these amendments, Congress revised the "owner or operator" exclusion for state or local governments found in CERCLA Section 101(20)(D).[32] Before this amendment, the exclusion provided that state or local governments that acquired ownership or control of a property "involuntarily"—mainly through tax foreclosure—would be exempted from liability. This appeared to leave a gap for potential state or local government liability for property acquired *voluntarily*, namely through asset forfeiture or otherwise as a result of law enforcement activities. To address this issue, Congress struck "involuntarily" from the provision and added language providing that state or local government entities that acquire ownership or control "through seizure or otherwise in connection with law enforcement activity" will now be excluded from being considered owners or operators.

The House Committee on Transportation and Infrastructure Report (House Report) notes that this amendment simply builds on the existing statutory third-party defense for state and local governments found in CERCLA Section 101(35)(A)(ii).[33] Local or state governments that acquire contaminated property pursuant to Section 101(20)(D) are still required to comply with the due care, cooperation, and other requirements of the third-party defense.[34]

One wonders if this amendment was really necessary—do law enforcement agencies ever acquire significantly contaminated property as a result of criminal investigations? Is someone really going to file a CERCLA Section 113(f) contribution suit against a local police department? Nevertheless, local or state law enforcement agencies are now free to obtain property as a result of criminal investigations without fear of facing CERCLA liability.

Section 3 – *Alaska Native Village and Native Corporation Relief*: These amendments add a new exclusion to the definition of "owner or operator" in CERCLA Section 101(20) for Alaska Native villages or Alaska Native corporations that received contaminated property from the U.S. government under the Alaska Native Claims Settlement Act.[35] Without this new exclusion, these Alaska Native villages and corporations could be held liable for contamination caused by the U.S. government and would not be eligible for federal brownfield grants; the amendment corrects the unfortunate imposition of liability by the statute's strict liability scheme. As with most "owner or operator" exclusions in CERCLA, the Alaska Native villages or Alaska Native corporations seeking Superfund liability protection must not have actually caused or contributed to a release or threatened release of a hazardous substance from the property.[36]

Section 4 – *Petroleum Brownfield Enhancement*: With this section of the BUILD Act, Congress updated the definition of "brownfield site," which establishes the scope of sites that qualify for funds under the Brownfields Program in CERCLA Section 104(k).[37] The amendments make it easier for petroleum-contaminated sites to receive funding under the Brownfields Program. The BUILD Act deleted language that previously required EPA or a state to first conduct a risk analysis evaluating whether potential petroleum-contaminated brownfield sites are of "relatively low risk, as compared to other petroleum-only sites in the State" before they are eligible to receive funding under the Brownfields Program. Deletion of the foregoing language should, in theory, accelerate the assessment and cleanup of some petroleum-contaminated brownfield sites.

However, the requirement that EPA find no viable responsible party associated with the petroleum-contaminated brownfield sites still remains.[38] The House Committee on Transportation and Infrastructure apparently received stakeholder input related to this provision and, as a result, has urged EPA to consider whether this requirement is truly necessary and does not unreasonably delay the assessment and cleanup of petroleum-contaminated sites.[39]

Section 5 – *Prospective Purchasers and Lessees*: From the perspective of a CERCLA practitioner, these are probably the most significant amendments to the law because Superfund liability protection has now been formally extended to tenants.

As most environmental practitioners know (or should know), the BFPP provision shields prospective owners from Superfund liability by allowing them to purchase property even though they learn of hazardous substances on the property prior to closing. It therefore differs from the innocent landowner defense to liability, which protects purchasers of property who conducted all appropriate inquiries into the past uses of the property (typically via Phase I Environmental Site Assessments (ESAs) but not exclusively so[40]), but only discovered the presence of hazardous

[32] CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D).
[33] *See* H.R. REP. NO. 115-419 at 11; *see also* CERCLA § 101(35)(A)(ii), 42 U.S.C. § 9601(35)(A)(ii).
[34] *See* H.R. REP. NO. 115-419 at 12.
[35] *See* CERCLA § 101(20)(E), 42 U.S.C. § 9601(20)(E).
[36] *See* CERCLA § 101(20)(E)(ii), 42 U.S.C. § 9601(20)(E)(ii).
[37] *See* CERCLA § 101(39)(D)(ii)(II)(bb), 42 U.S.C. § 9601(39)(D)(ii)(II)(bb).
[38] CERCLA § 101(39)(D)(ii)(II)(bb), 42 U.S.C. § 9601(39)(D)(ii)(II)(bb).
[39] *See* H.R. REP. NO. 115-419 at 12.
[40] "At least one court has determined that a Phase I assessment is not the exclusive means by which a purchaser of land can make all appropriate inquiries. . . . The . . . court determined that the Senate Report on the amendment adding the 'shall satisfy' language to CERCLA read that a Phase I assessment '*can* satisfy' the 'all appropriate inquiries' requirement. . . . That court also noted that 'Congress could have provided that a Phase I site assessment was required or was the exclusive procedure to satisfy the 'all appropriate inquiries' standard; however, Congress made no such mandate.'" Von Duprin LLC v. Moran Elec. Serv., 2019 U.S. Dist. LEXIS 21305, at *47–48 (S.D. Ind. Feb. 11, 2019) (citing R.E. Goodson Constr. Co., Inc. v. Int'l Paper Co., 2006 U.S. Dist. LEXIS 39850, at *6 (D.S.C. June 14, 2006)).

substances after purchase. The benefits of the BFPP exemption are clear—no longer would such prospective purchasers fail to close on property once they discovered hazardous substances—but until now its application was expressly limited to prospective owners. As a result, in the early years of the BFPP provision, tenants could be classified as CERCLA operators (and sometimes as owners) subject to liability for the cleanup of a contaminated site if they entered into a lease with knowledge of the contaminated condition of the property without being able to benefit from the BFPP liability shield.

To address this unfortunate result, EPA issued guidance in December 2012 that broadened the BFPP exemption to include tenants. With this new policy, "Revised Enforcement Guidance Regarding the Treatment of Tenants under the CERCLA Bona Fide Prospective Purchaser Provision," EPA extended this critical CERCLA liability protection to tenants.[41] The policy change was rather narrow, however, and was just policy, always subject to change. As a result, tenants were provided no assurances of this important exemption from CERCLA liability.

In the BUILD Act, Congress provided that tenants can qualify for the BFPP exemption from CERCLA liability regardless of the owner's status as a BFPP. This change is generally consistent with, but even broader than, the EPA enforcement policy from 2012.

A person with a leasehold interest can qualify as a BFPP if (i) he/she acquires a leasehold interest after January 11, 2002; (ii) he/she establishes that the leasehold interest is not designed just to avoid liability; and (iii) one of the following three conditions applies:

1. the owner him/herself is a BFPP;
2. the owner him/herself *was* a BFPP when the leasehold interest was acquired *but* due to circumstances unrelated to the tenant, has somehow lost BFPP status;[42] or
3. the tenant conforms with all of the statutory requirements of BFPPs, including conducting all appropriate inquiries.[43]

Congress also revised the "No Affiliation" requirement for BFPP status to provide that a tenant can still qualify as a BFPP. The amended requirement provides that "the instruments by which a leasehold interest in the facility is created" (e.g., the lease) will not be considered a direct contractual or financial relationship that would otherwise destroy the BFPP exception.[44]

The BUILD Act therefore broadens, as well as codifies, the BFPP liability protection previously afforded to lessees under EPA's policy. Courts, of course, treat administrative agency policy as persuasive authority but not controlling law. Now that CERCLA provides that tenants do not have to rely on their landlords to attain BFPP status, parties and courts will have greater certainty when the issue arises in litigation (as it does from time to time).[45]

This change provides additional incentives for commercial and industrial tenants to perform Phase I ESAs before leasing property to ensure they meet the baseline AAI requirements.

Sections 6 to 13 – *Reauthorization of the Brownfields Program and Amendments Thereto:* The bulk of the BUILD Act consists of various amendments to the federal Brownfields Program created by CERCLA Section 104(k). The summary below touches on some of the more significant or otherwise interesting amendments:

- The amendments first add non-profit organizations and qualified "community development entities," as well as limited liability corporations and limited partnerships in which all managing members or sole members or general partners are nonprofit organizations, to the list of entities eligible for brownfield grants or loans.[46] This should, in theory, broaden the pool of Brownfields Program grant applicants and encourage participation by organizations that serve diverse communities.
- Congress also amended the Brownfields Program by allowing governmental entities to receive grant money for brownfield site characterization, assessment, or remediation for properties acquired by the governmental entities prior to January 11, 2002 (the date BFPP exemption from Superfund liability was added to CERCLA).[47] With these amendments, Congress intended to provide explicit authorization to governmental entities to apply for and use Brownfields Program grant money "even if the eligible entity does not qualify as a [BFPP]," provided such entities have not actually caused or contributed to the release or threatened release of a hazardous substance at the site.[48] While these amendments do not affect the

[41] EPA, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision (Dec. 5, 2012), https://www.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf.

[42] For example, this condition might apply where an owner did not exercise appropriate care at the property, failed to cooperate with EPA or a state agency, or did not provide legally required notices with respect to discovery or release of any hazardous substances at the facility.

[43] CERCLA § 101(40)(A)(ii), 42 U.S.C. § 9601(40)(A)(ii).

[44] CERCLA § 101(40)(B)(viii), 42 U.S.C. § 9601(40)(B)(viii).

[45] *See, e.g.*, Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321 (2d Cir. 2000) ("Although we conclude that a lessee may, under some circumstances, be held liable under CERCLA as an 'owner,' we conclude that, under the circumstances of this case, Barlo was not an 'owner' within the meaning of CERCLA. Accordingly, we reverse the judgment of the district court in substantial part [and hold the lessee not liable under CERCLA].").

[46] CERCLA § 104(k)(1)(I)–(L), 42 U.S.C. § 9604(k)(1)(I)–(L).

[47] CERCLA § 104(k)(2)(C), 42 U.S.C. § 9604(k)(2)(C).

[48] CERCLA § 104(k)(2)(C), 42 U.S.C. § 9604(k)(2)(C).

potential Superfund liability of a governmental entity for properties acquired prior to January 11, 2002, it allows these non-BFPP governmental entities to apply for brownfield grants and loans without restrictions.

- The BUILD Act also increases the amount of money that can be awarded by EPA for remediation grants from $200,000 to $500,000, and allows EPA to increase that amount to $650,000 by waiver.[49] According to the 2017 House Report,[50] multiple stakeholders commented that due to inflation and the increasing complexity of some brownfield sites, the prior maximum cleanup grant level of $200,000 was insufficient. Some would argue that even $500,000 (or $650,000) is insufficient to clean up most significantly contaminated brownfields sites.

- In addition to increasing the amount of money that could be awarded for remediation grants, the BUILD Act adds a new grant provision for "multipurpose grants."[51] The previous Brownfields Program provided grants only for site characterization and assessment, or for remediation. These multipurpose grants, however, expressly encourage applicants to also seek funds for inventory and planning activities at brownfield sites—activities for which grant funds were previously unavailable under the previous version of the Program. Under this new authority, EPA may provide a maximum of $1 million in funding per grant to eligible entities.[52] While EPA has authority to award multipurpose grants of up to $1 million, the agency has determined that it will provide grants of no more than $800,000, and anticipates selecting just 10 proposals for these types of grants.[53] The statute requires that a recipient own the brownfield property prior to spending grant money for remediation purposes.[54] Additionally, grant recipients have five years to spend funds, unless EPA grants an extension.[55]

- Congress also decided to remove the statutory prohibition on grantees using funds for reasonable administrative costs.[56] Apparently, the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment heard from several stakeholders that this prohibition made it difficult for local governments and community organizations, among others, to effectively implement their cleanup programs and projects.[57] This prohibition also served as a barrier to local organizations using brownfields funding in small, rural, or disadvantaged areas.[58]

- In an attempt to encourage "green" brownfields projects, the BUILD Act expanded the list of grant ranking criteria to include the extent to which projects would address sites adjacent to a waterbody or federally designated flood plain,[59] or the extent to which the grant would facilitate the siting of renewable energy projects (i.e., wind, solar, geothermal) or an energy efficiency improvement project.[60]

- The BUILD Act also repealed a provision that required 25% of annual site characterization, assessment, and remediation grant funds to be allocated to sites contaminated by petroleum or petroleum product.[61]

- Finally, Congress reauthorized the funding of the federal Brownfields Program for $200 million in federal appropriations for fiscal years 2019 through 2023.[62]

Section 14 – *Small Community Technical Assistance Grants*: Congress added a new authority for EPA to make grants of up to $20,000 to states and tribes to provide training, technical assistance, or research assistance to support small communities, Indian tribes, rural areas, or disadvantaged areas.[63]

Section 15 – *State Response Program Funding*: The final section of the BUILD Act amends CERCLA Section 128 to authorize $50 million in federal funds for fiscal years 2019 through 2023. This is the pool of money that can be awarded to states for the implementation of states' own brownfields programs.

Missed Opportunities

As we approach the fortieth anniversary of CERCLA, environmental practitioners across the country would agree the law is ripe for significant changes across several areas. This is not to say that CERCLA has been a failure—but it has been an ambitious

[49] CERCLA § 104(k)(3)(A)(ii), 42 U.S.C. § 9604(k)(3)(A)(ii).
[50] *See* H.R. REP. NO. 115-419, pt. 1, at 14 (2017).
[51] CERCLA § 104(k)(4), 42 U.S.C. § 9604(k)(4).
[52] CERCLA § 104(k)(4)(B)(i), 42 U.S.C. § 9604(k)(4)(B)(i).
[53] *Multipurpose, Assessment, RLF, and Cleanup (MARC) Grant Application Resources*, EPA, https://www.epa.gov/brownfields/multipurpose-assessment-rlf-and-cleanup-marc-grant-application-resources (last updated Feb. 1, 2019).
[54] CERCLA § 104(k)(4)(E), 42 U.S.C. § 9604(k)(4)(E).
[55] CERCLA § 104(k)(4)(D), 42 U.S.C. § 9604(k)(4)(D).
[56] CERCLA § 104(k)(5)(E), 42 U.S.C. § 9604(k)(5)(E).
[57] *See* H.R. REP. NO. 115-419, pt. 1, at 15 (2017).
[58] H.R. REP. NO. 115-419 at 15.
[59] CERCLA § 104(k)(6)(C)(xi), 42 U.S.C. § 9604(k)(6)(C)(xi).
[60] CERCLA § 104(k)(6)(C)(xii), 42 U.S.C. § 9604(k)(6)(C)(xii).
[61] *See* H.R. REP. NO. 115-419 at 5, 16.
[62] CERCLA § 104(k)(13), 42 U.S.C. § 9604(k)(13).
[63] CERCLA § 128(a)(1)(B)(iii), 42 U.S.C. § 9628(a)(1)(B)(iii).

experiment that is in need of seriously overdue fine-tuning. Even if some consider the law an utter failure, we need to be reminded that "failure isn't fatal, but failure to change might be."[64]

We have learned many lessons since CERCLA's enactment and since the post-SARA amendments. With those lessons in hand, I firmly believe that the 115th Congress could have done more to improve the law in several respects. For instance, Congress could have clarified certain aspects of the statute to avoid unnecessary litigation and could have provided additional incentives for the cleanup of brownfield sites by private developers.

Below are just a handful of items that Congress could have addressed and that should be considered for future CERCLA revisions:[65]

1. **Applicable or Relevant and Appropriate Requirements (ARARs) should be updated.** Issues with ARARs must be addressed on several fronts. Rather than specifying standards for contaminants, CERCLA functions as an "umbrella" statute that relies on other statutes or regulations for site remediation standards. Section 121(d) broadly requires that cleanup comply with ARARs to protect human health and the environment.[66] ARARs can include a variety of standards, requirements, or other criteria, creating a complex web of demands for those interested in remediating a site.

   Indeed, members of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) testified before Congress in 2016 and 2017 that their main areas of concern included "[EPA's] inconsistent application of ARARs from site to site"[67] and the lack of written documentation on the rational [sic] used to determine ARARs."[68]

2. **NCP process is outdated and should be revised.** The National Contingency Plan (NCP) should be updated to reflect important lessons learned from almost 40 years of site remediation by EPA, states, and private parties under CERCLA, the Resource Conservation and Recovery Act (RCRA),[69] and state cleanup programs. For example, it is time serious consideration is given to whether every PRP-led and PRP-funded cleanup should go through a complete NCP process. As practitioners may know, the NCP requires a site-specific baseline risk assessment for specific contaminants of concern at the site—this endeavor is typically costly and extremely time-consuming. Instead of this process, Congress should mandate that EPA develop soil and groundwater cleanup standards for the most common contaminants found at Superfund sites, and those standards should vary based on the anticipated future use of the site. This would emulate the model used across the country for various state voluntary cleanup and Superfund programs, including New York's. CERCLA pretends that every contaminated site might someday be put to residential use, which is unrealistic and creates inefficiencies. There are ways to streamline the Superfund cleanup process, and this is one of them.

3. **RCRA and CERCLA should be integrated.** Although RCRA and CERCLA address different purposes and programs,[70] they ultimately serve the same primary goal: ensuring that soil and groundwater at contaminated properties are properly remediated for the protection of human health and the environment. By integrating RCRA and CERCLA, Congress would allow PRPs, EPA, and state government entities the flexibility to select remedial goals and actions that would lead to more efficient cleanups. For example, in the early 2000s, the RCRA Corrective Action Program was transformed into a much more effective cleanup program, allowing states and EPA to speed up investigations and cleanup process while maintaining stringent standards for remediation.[71]

4. **Arranger liability should be clarified.** The Supreme Court's landmark decision in *Burlington Northern*,[72] which settled rather narrow issues with respect to arranger

[64] JOHN WOODEN WITH STEVE JAMISON, WOODEN: A LIFETIME OF OBSERVATIONS AND REFLECTIONS ON AND OFF THE COURT (1997).

[65] It should be noted that some of these suggestions are not entirely new. For example, CERCLA critics have noted for years that the National Contingency Plan process is outdated and due for an update. Additionally, many environmental law practitioners think it is time that CERCLA and the Resource Conservation and Recovery Act (RCRA) be integrated in order to streamline the remediation of contaminated sites. Nevertheless, until Congress decides to actually enact significant amendments to the law, these existing suggestions are worth re-exploring.

[66] CERCLA § 121(d), 42 U.S.C. § 9621(d).

[67] *Oversight of the U.S. Environmental Protection Agency's Superfund Program: Hearing Before the Senate Subcomm. on Superfund, Waste Mgmt., and Regulatory Oversight of the Comm. on Env't and Pub. Works*, 115th Cong. 49 (2017) (testimony of Jeffrey A. Steers, Former President and Vice-Chair CERCLA Post Construction Focus Group, Association of State and Territorial Solid Waste Management Officials (ASTSWMO)).

[68] *Oversight of CERCLA Implementation: Hearing Before the House Subcomm. on Env't and the Econ. of the Comm. on Energy and Commerce*, 114th Cong. 67 (2016) (testimony of Amy Brittain, Remedial Action Focus Group Chair, ASTSWMO).

[69] 42 U.S.C. §§ 6901–6992k.

[70] RCRA provides EPA with the statutory authority to "control hazardous waste from the 'cradle-to-grave' [including] the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes." *Summary of the Resource Conservation and Recovery Act*, EPA, https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act (last updated Aug. 15, 2018).

[71] *Modernizing the Superfund Cleanup Program: Hearing Before the House Subcomm. on the Env't of the Comm. on Energy and Commerce*, 115th Cong. (2018) (testimony of Stephen A. Cobb, ASTSWMO), *available at* https://docs.house.gov/meetings/IF/IF18/20180118/106783/HHRG-115-IF18-Wstate-CobbS-20180118.pdf.

[72] Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599 (2009).

liability, appears to have opened a Pandora's box of issues. Circuit and district courts are still struggling to determine what constitutes an "arranger." For example, some courts are now grappling with the question of whether "intent to dispose" requires that the alleged arranger knew that materials being disposed of contained hazardous substances.[73] These and other similar issues[74] could be resolved through congressional action.

5. **EPA should be provided more latitude and flexibility in settling cases.** Cost recovery claims brought by EPA that have not been referred to the U.S. Department of Justice (DOJ) and are settled currently require DOJ approval if total response costs are more than $500,000.[75] Given the complexity of most Superfund sites and the fact that EPA response costs can easily run into the millions of dollars, this rather low threshold creates an unnecessary hurdle for settlement. Furthermore, sometimes the need for DOJ approval creates a disincentive for regional EPA counsel to settle quickly. Due to the $500,000 threshold, EPA may prefer to issue consent decrees for *de minimis* settlements to avoid DOJ involvement, which must be sought when administrative orders are used (though orders may be deemed approved if DOJ does not act within 30 days of referral).[76] The threshold could also be increased to encourage EPA to use arbitration for cost recovery settlements.[77]

6. **Federal income tax credits to encourage low- and moderate-income housing.** Grants issued under the federal Brownfields Program are limited in number. Although EPA receives hundreds of applications, EPA typically awards fewer than 200 grants per year. For example, for fiscal year 2018, EPA awarded 149 grants under the Brownfields Program.[78] The vast majority of these grants were awarded to state and municipal entities, with some going to non-profit organizations.

   Amending CERCLA to provide for federal income tax credits would incentivize private developers to pursue brownfield redevelopment. This concept can be taken a step further and bonuses can be issued for the development of low- or moderate-income housing in urban or suburban areas. This type of program has worked well in New York State. There is no reason why it cannot be implemented on a federal level.

Conclusion

The BUILD Act was, at its core, a basic effort by the 115th Congress to reauthorize the Brownfields Program. While the amendments included a handful of useful but relatively minor changes—such as expanding CERCLA liability protection to governmental entities that acquire property as a result of law enforcement activities, excluding certain Alaska Native villages and corporations from "owner or operator" status, and extending BFPP liability protection to tenants—Congress could have done a lot more to advance the underlying goals of the Superfund program and to update parts of CERCLA that have not been touched in decades.[79] Until that does happen, EPA, state and local governmental entities, and private parties—and the environmental practitioners who represent them all—must continue navigating unnecessary hurdles in the complex web of the federal Superfund statute to achieve the central national cleanup goals.

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[73] *See, e.g.*, Town of Islip v. Datre, 245 F. Supp. 3d 397, 424 (E.D.N.Y. 2017) ("Thus, just as the term 'arrange' implies a specific intent to dispose of the substance, . . . so too does it imply knowledge that the substance is hazardous." (citation omitted)).

[74] Another recent CERCLA case explores the meaning of the term "all costs" in Section 107(a)(1) and considers whether a potentially responsible party should also be responsible for reimbursing the government for costs incurred prior to ownership. *See* Pa. Dept. of Envtl. Prot. v. Trainer Custom Chem., LLC, 906 F.3d 85, 91–94 (3d Cir. 2018).

[75] CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1).

[76] CERCLA § 122(g)(4), 42 U.S.C. § 9622(g)(4).

[77] *See* CERCLA § 122(h)(2), 42 U.S.C. § 9622(h)(2).

[78] *See Brownfields Grant Fact Sheet Search*, EPA, https://cfpub.epa.gov/bf_factsheets/ (last visited Mar. 8, 2019) (select "2018" for "Grant Announcement Year" filter and "ALL" for other filters).

[79] It should be noted that the 115th Congress made another set of amendments to CERCLA in the Consolidated Appropriations Act of 2018. Buried even deeper in the spending bill—on page 800 of 878—one will find Title XI of Division S, the "Fair Agricultural Reporting Method Act" or "FARM Act." The FARM Act amended CERCLA Section 103(e) to exempt air emissions from animal waste at a farm from reporting under CERCLA. Pub. L. No. 115-141, div. S, tit. XI, § 1101, 132 Stat. 1147. This is hardly a significant update to Section 103 and arguably does nothing to further CERCLA's underlying goals.